Filed 6/7/17 P. v. Navarette CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOE HERNANDEZ NAVARETTE, Defendant and Appellant.	H042842 (Monterey County Super. Ct. No. SS131240A)

Defendant Joe Hernandez Navarette committed a series of armed robberies at various stores and restaurants in Salinas. A jury found him guilty on eight counts of second degree robbery and two counts of assault with a firearm. (Pen. Code, §§ 211, 245, subd. (a)(2).)[1] The jury also found Navarette personally used a firearm in the commission of each offense. He admitted two prior prison terms and a prior strike conviction. The trial court imposed a total term of 51 years in prison.

Navarette raises four claims on appeal. First, he contends the evidence was insufficient to support the two convictions for assault with a firearm. Second, he contends the trial court erred by failing to instruct the jury on brandishing a firearm as a lesser included offense of assault with a firearm. We find these claims without merit.

Third, Navarette contends the court erred by imposing two one-year terms for two prior prison term enhancements under section 667.5, subdivision (b). The Attorney

[1] Subsequent undesignated statutory references are to the Penal Code.

General concedes the court erred by imposing these terms. We accept the concession. We will order the trial court to strike the terms and resentence defendant on remand. Finally, Navarette contends the minutes of the sentencing hearing incorrectly reflect the imposition of these two terms. Because we will order the terms stricken, this claim is moot.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. *Facts of the Offenses*

Navarette robbed five Salinas establishments on six separate occasions in 2013.[2] On May 31, he robbed a Little Caesars pizzeria and the Santa Cruz Market. On June 13, he robbed the same Santa Cruz Market and Bozzo's Liquors. On June 15, he robbed Mountain Mike's Pizza and the Salinas Market. He was armed during all six robberies.

Video cameras captured the robberies at Salinas Market, Bozzo's Liquors, and the Santa Cruz Market. Still photographs were captured at Mountain Mike's Pizza. Police observed a common pattern in the videos: The robber usually parked toward the back of the business and he carried a shotgun at his right side. As the robber approached each business, he would adjust his hoodie to cover his face. Once inside, he would point with his left hand bent at the wrist, and he made a certain gesture with his fingers when demanding the money.

The videos also showed that the robber had discolored patches of skin on his left hand. The prosecution introduced the expert testimony of a dermatologist concerning vitiligo—a condition resulting in light, hypopigmented patches of skin. Only one-half to one percent of the United States population suffers from vitiligo. When shown photographs of Navarette's hand, the expert identified several hypopigmented patches. After comparing the patches on Navarette's hand with the patches on the robber's hands in the videos, the expert testified that the patches were consistent.

[2] All dates in this section refer to 2013.

1. *The May 31 Little Caesars Robbery*

Around 9:30 p.m. on May 31, a man wearing a black hoodie walked into Little Caesars with a shotgun. About 15 to 25 people were there at the time. The restaurant had no video cameras.

Alejandro Reyes testified that he was working as a cashier at Little Caesars on the night of the robbery. Reyes described the robber as "kind of white complected" with a black hoodie partially covering his face. When the robber came in, he was trying to "make a scene" and he struck a customer with the gun. The robber pointed the gun at Reyes and demanded money. Reyes began opening registers and giving the cash to the robber. After Reyes gave him the money, the robber walked out.

Ruben Teodores testified that he was waiting in line for his pizza when the robber came in. The robber started waving or motioning with the gun while demanding that everyone get down. He pointed the gun at one person and waved the gun in the direction of Teodores. Teodores got down on the floor and kept his head down. He heard the robber demand money. Teodores told police the robber was a Hispanic man approximately six feet tall weighing 200 pounds.

Luis Rangel testified that he was waiting for his pizza when the robber walked in and shouted at everyone to get on the floor. Rangel, who was "pretty terrified," got down on the floor. The robber was pointing a gun, but he did not point the gun in Rangel's direction. Rangel told police the robber was wearing a hooded sweater.

2. *The Remaining Robberies*

Because the issues on appeal concern the Little Caesars robbery, we describe the facts of the remaining robberies summarily.

Navarette robbed the Santa Cruz Market for the first time around 9:45 p.m. on May 31, shortly after the Little Caesars robbery. A skateboarder in the parking lot described a man wearing a hooded sweatshirt walking into the store with a large gun. The cashier testified that the robber pointed the gun at him and demanded money. After

the cashier gave the robber the cash from two registers, the robber demanded a bottle of Patron tequila. Video cameras captured the robbery.

Navarette robbed the Santa Cruz Market a second time around 10:00 p.m. on June 13. The cashier testified the robber was wearing a black, hooded sweatshirt. He pointed the gun at her head and demanded money. She gave him more than a thousand dollars. After demanding a bottle of Patron tequila, he ordered her at gunpoint to lie down on the floor. The store did not have video cameras at the time because the system was undergoing an upgrade after the May 13 robbery.

A short time later, Naverette robbed Bozzo's Liquors. The store owner and her husband were working in the store at the time. They testified that a robber wearing a sweatshirt entered the store with a gun, pointed it at the husband, and told them to get down. The husband, who was at the front door carrying a bag with the store's sales, gave the robber $240. The robber then demanded the money from the register, where the wife was working. She gave him around $700. A witness outside the store saw the robbery taking place and called 911. The witness then watched the robber drive away. She described the car to police and gave them the license plate number.

Around 6:00 p.m. on June 15, Navarette robbed Mountain Mike's Pizza. More than 50 people were in the restaurant at the time. The manager testified that he saw a hoodie-wearing robber point a shotgun at a screaming woman in the doorway. The robber then walked to the cash registers and pointed the gun at a cashier. The cashier was so terrified that she fell to the floor before she could open a register. Another cashier opened a register and gave around $200 to the robber.

A short time later, Naverette robbed the Salinas Market. The owner testified that he was behind the cash registers when a hooded man with a gun robbed the store. The owner's wife gave the robber around $1,500.

B. *Procedural Background*

The First Amended Information (the operative charging document) charged Navarette with ten counts: Count One—Second degree robbery of Alejandro Reyes (Little Caesars Pizzeria) on May 31, 2013 (§ 211); Count Two—Assault with a firearm on Ruben Theodores (Little Caesars Pizzeria) on May 13, 2013 (§ 245, subd. (a)(2)); Count Three—Assault with a firearm on Luis Rangel (Little Caesars Pizzeria) on May 13, 2013 (§ 245, subd. (a)(2)); Count Four—Second degree robbery of Isidro Perales (Santa Cruz Market) on May 31, 2013 (§ 211); Count Five—Second degree robbery of Claudia Martinez (Santa Cruz Market) on June 13, 2013 (§ 211); Count Six—Second degree robbery of Antonio Ayala (Bozzo's Liquor) on June 13, 2013 (§ 211); Count Seven—Second degree robbery of Josephina Gasca (Bozzo's Liquor) on June 13, 2013 (§ 211); Count Eight—Second degree robbery of Nathan Odom (Mountain Mike's Pizza) on June 15, 2013 (§ 211); Count Nine—Second degree robbery of Mr. Perez (Mountain Mike's Pizza) on June 15, 2013 (§ 211); and Count Ten—Second degree robbery of Young Chu (Salinas Market) on June 15, 2013 (§ 211).

The prosecution alleged several enhancements. As to all counts, the information alleged Navarette personally used a firearm (§§ 12022.5, subd. (a), 12022.53, subd. (b)). The information further alleged two prior prison terms, and a serious felony and strike conviction for robbery with a firearm in 2007. (§§ 667, subd. (a)(1), 667.5, subd. (b), 1170.12, subd. (c)(1).)

The jury found Navarette guilty on all counts and found the firearm enhancements true. Naverette admitted to two prior prison terms and admitted the prior serious felony and strike conviction.

The trial court imposed an aggregate term of 51 years as follows: Count One—16 years, equal to six years (the midterm of three years doubled for the strike) plus 10 years for the firearm enhancement; Count Two—A consecutive term of three years and four months, equal to two years (double one-third the midterm) plus one year four

months for the firearm enhancement; Count Three—A concurrent term of 10 years, equal to six years (double the midterm) plus the midterm of four years for the firearm enhancement; Counts Four, Five, Six, Eight, and Ten—Consecutive terms of five years four months, each equal to two years (double one-third the midterm) plus three years four months for the firearm enhancement; Counts Seven and Nine—Concurrent terms of 16 years, each equal to six years (double the midterm) plus 10 years for the firearm enhancement; and a consecutive five-year term for the prior serious felony conviction. The court imposed and stayed one-year terms for each of the two prior prison term enhancements.

II. DISCUSSION

A. *Sufficiency of the Evidence Supporting Counts Two and Three*

Defendant contends the evidence was insufficient to support convictions on Counts Two and Three for assault with a firearm on Teodores and Rangel at Little Caesars. The Attorney General contends the evidence was sufficient. We conclude the evidence was sufficient as to both counts.

1. *Legal Principles*

"An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) To prove assault with a firearm, the evidence must show: (1) the defendant willfully did an act with a firearm; (2) that the act by its nature would probably and directly result in the application of physical force to a victim; (3) that the defendant was aware of facts that would lead a reasonable person to realize force would be applied to the victim as a direct, natural, and probable result of this act; and (4) when the defendant acted, he had the present ability to apply force with a firearm to the victim. (*People v. Velasquez* (2012) 211 Cal.App.4th 1170, 1176; *People v. Valdez* (1985) 175 Cal.App.3d 103, 111.)

"[I]t is a defendant's action enabling him to inflict a present injury that constitutes the actus reus of assault. There is no requirement that the injury would necessarily occur

as the very next step in the sequence of events, or without any delay." (*People v. Chance* (2008) 44 Cal.4th 1164, 1172.) " 'There need not be even a direct attempt at violence; but any indirect preparation towards it, under the circumstances mentioned, such as drawing a sword or bayonet, or even laying one's hand upon his sword, would be sufficient.' " (*Ibid.*, quoting *Hays v. The People* (N.Y. Sup.Ct. 1841) 1 Hill 351, 353.) "[W]hen a defendant equips and positions himself to carry out a battery, he has the 'present ability' required by section 240 if he is capable of inflicting injury on the given occasion, even if some steps remain to be taken, and even if the victim or the surrounding circumstances thwart the infliction of injury." (*Ibid.*)

" 'Claims challenging the sufficiency of the evidence to uphold a judgment are generally reviewed under the substantial evidence standard. Under that standard, " 'an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find [the elements of the crime] beyond a reasonable doubt.' " [Citations.] " ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment." ' " [Citations.]' (*In re George T.* (2004) 33 Cal.4th 620, 630-631.) Furthermore, 'In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]' (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)" (*People v. Fierro* (2010) 180 Cal.App.4th 1342, 1347.)

2. *The Record Shows Sufficient Evidence to Support the Convictions*

Navarette argues that the prosecution failed to present sufficient evidence he committed an act that would "probably and directly" result in the application of force to Teodores or Rangel or that he had the "present ability" to apply force to them. Navarette contends he took no action with the gun except for waving it around, and he claims he did not aim or wave the gun in the direction of Teodores or Rangel. He contends he did not approach, threaten, or speak to either victim, and he argues there was no evidence he was physically in a location from which he could have used force against them.

We reject Navarette's characterization of the evidence. First, the evidence clearly shows Navarette had the "present ability" to inflict injury on Teodores or Rangel. The present ability element requires proof that the defendant "maneuvered himself into such a location and equipped himself with sufficient means that he appears to be able to strike immediately at his intended victim." (*People v. Valdez, supra,* 175 Cal.App.3d at p. 112.) A defendant has the present ability to injure "where he is only a moment away from being able to fire his gun." (*Id.* at p. 111.) When Navarette entered the Little Caesars with a shotgun in his hand, Teodores and Rangel were waiting for their food. Teodores was standing in line next to the door. Rangel did not say exactly where in the store he was located, but he testified that he saw Navarette pointing the gun, and he described Navarette's appearance to the police. A reasonable jury could infer that Navarette was close enough to both victims such that he could have immediately fired his gun at them, thereby inflicting injury on them. Navarette had "maneuvered himself" into this location, and with the shotgun in his possession, he had sufficient means "to strike immediately" at either victim. We conclude the evidence is sufficient to support a finding that Navarette had the present ability to inflict injury on both Teodores and Rangel.

As to whether Navarette committed an act that would "probably and directly" result in the application of force on the victims, he contends his act of waving the gun

was insufficient to satisfy this element. He argues that this element would require him to "single them out in some way, grab the rifle with both hands, position himself in a location from which he could strike at them, and then aim the gun in their direction," such that he was several steps away from an immediate application of force on the victims. As a factual matter, the evidence belies this assertion. First, as we conclude above, a reasonable jury could infer that Navarette was already positioned in a location from which he could fire his weapon at Teodores or Rangel. Second, contrary to Navarette's assertion, Teodores specifically testified that Navarette waved the gun in Teodores' direction. Furthermore, Navarette could have discharged the shotgun with one hand. This evidence reasonably supports the inference that Navarette was only a trigger-pull away from shooting Teodores.

Rangel testified that Navarette did not point the gun at him, such that shooting Rangel would have required the extra step of pointing the gun towards him. But Navarette cites no authority supporting the proposition that assault with a firearm requires the defendant to point the firearm directly at the victim. To the contrary, "Assault with a deadly weapon can be committed by pointing a gun at another person [citation], but it is not necessary to actually point the gun directly at the other person to commit the crime." (*People v. Raviart* (2001) 93 Cal.App.4th 258, 263.)

As Navarette concedes, courts have found sufficient evidence to support assault with a deadly weapon where the defendant's waving or displaying of a weapon is accompanied by additional acts. The point is proven by the cases Navarette cites. In *People v. Parks* (1971) 4 Cal.3d 955, the defendant waved his gun, shot out a window, and made threats on the life of the victim. In *People v. Bird* (1881) 60 Cal. 7, the defendant "rushed" toward the victim and gestured "menacingly." In *People v. Hunter* (1925) 71 Cal.App. 315, the defendant threatened to kill his estranged wife and showed her a gun he had strapped to his leg. In all three cases, the court found sufficient evidence to support convictions for assault with a deadly weapon.

Here, as in those cases, the act of waving the gun was accompanied by other threatening actions. Navaratte waved the gun around the store, waved it in the direction of Teodores, and pointed it directly at the cashier. He also demanded that everyone—including Teodores and Rangel—get down on the floor, impliedly threatening to shoot them if they failed to comply. From this evidence, a reasonable jury could find beyond a reasonable doubt that Navarette's actions would probably and directly result in the application of force to the victims. As to the remaining elements of the offense, Navarette does not challenge the sufficiency of the evidence supporting them. We conclude the evidence is sufficient to support convictions for assault with a deadly weapon on Counts Two and Three.

B. *Failure to Instruct on Brandishing a Firearm as a Lesser Included Offense*

Navarette contends the trial court erred by failing to instruct the jury on the offense of brandishing a firearm as a lesser included offense with respect to Counts Two and Three. The Attorney General contends the court had no sua sponte duty to give the instruction because brandishing is not a lesser included offense of assault with a firearm. The Attorney General further contends any assumed error was harmless. We conclude the trial court did not err because brandishing a firearm is not a lesser included offense of assault with a firearm.

1. *Legal Principles*

Section 417 defines the offense of brandishing a weapon as follows, in relevant part: "Every person who, except in self-defense, in the presence of any other person, draws or exhibits any firearm, whether loaded or unloaded, in a rude, angry, or threatening manner, or who in any manner, unlawfully uses a firearm in any fight or quarrel is punishable as follows . . . ." (§ 417, subd. (a)(2).)

"[I]t is the 'court's duty to instruct the jury not only on the crime with which the defendant is charged, but also on any lesser offense that is both included in the offense charged and shown by the evidence to have been committed.' [Citation.]" (*People v.*

Gutierrez (2009) 45 Cal.4th 789, 826.) " 'On appeal, we review independently the question whether the trial court improperly failed to instruct on a lesser included offense.' [Citation.] 'For purposes of determining a trial court's instructional duties, we have said that "a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser." ' [Citation.] When applying the accusatory pleading test, '[t]he trial court need only examine the accusatory pleading.' [Citation.] '[S]o long as the prosecution has chosen to allege a way of committing the greater offense that necessarily subsumes a lesser offense, and so long as there is substantial evidence that the defendant committed the lesser offense without also committing the greater, the trial court must instruct on the lesser included offense.' [Citation.]" (*People v. Banks* (2014) 59 Cal.4th 1113, 1160, italics omitted, abrogated on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

2. *Brandishing Is Not a Lesser Included Offense of Assault with a Firearm*

As the Attorney General points out, numerous courts have held that brandishing is not a lesser included offense of assault with a firearm. (See *People v. Steele* (2000) 83 Cal.App.4th 212, 218, collecting cases.) "Even though most assaults with a firearm undoubtedly include conduct fitting into the definition of brandishing, it has long been held that brandishing is a lesser related offense, rather than lesser included. [Citations.] The reason of course, is that it is theoretically possible to assault someone with a firearm without exhibiting the firearm in a rude, angry or threatening manner, e.g., firing or pointing it from concealment, or behind the victim's back." (*Ibid.*) Furthermore, "the trial court has no sua sponte duty to instruct the jury on lesser related offenses, and [a] defendant's failure to request the instruction at trial waives the issue on appeal." (*People v. Hawkins* (1995) 10 Cal.4th 920, 952 abrogated on other grounds by *People v. Lasko*

(2000) 23 Cal.4th 101.) Navarette failed to request an instruction on brandishing, thereby waiving any claim as to the lesser related offense.

Navarette relies on *People v. Wilson* (1967) 66 Cal.2d 749 (*Wilson*), in which the California Supreme Court reversed a felony murder conviction for failure to instruct on brandishing, among other errors. But the court in *Wilson* did not hold that brandishing is a lesser included offense of assault with a deadly weapon. (See *People v. Steele*, *supra*, 83 Cal.App.4th at p. 219.) In *Wilson*, a jury convicted the defendant of two counts of murder and assault with a deadly weapon. Consistent with the felony murder rule, the jury was instructed that the defendant could be found guilty of murder if he committed burglary by entering the victim's residence with the intent to commit assault with a deadly weapon. The high court held it was error for the trial court not to instruct on brandishing because the jury could have found the defendant entered the apartment only to brandish his weapon—a misdemeanor that would not have satisfied the felony murder rule. Nowhere in the opinion did the high court hold that brandishing is a lesser included offense of assault with a deadly weapon. (See *People v. Escarcega* (1974) 43 Cal.App.3d 391, 399, discussing *Wilson*.)

We are persuaded by the numerous appellate courts holding that brandishing is not a lesser included offense of assault with a firearm notwithstanding the language in *Wilson*. We conclude the trial court did not err by omitting the brandishing instruction.

C. *Terms Imposed for the Prior Prison Term Enhancements*

As set forth above, the trial court imposed and stayed two one-year terms for each of two prior prison terms under section 667.5, subdivision (b). One of the prison terms resulted from a 2007 armed robbery conviction—a strike—and the other term resulted from a 2005 conviction for possession of a stolen vehicle and possession of a firearm. Based on the 2007 robbery conviction, the trial court doubled the terms on all counts and added a five-year term under section 667, subdivision (a)(1).

Navarette contends the trial court erred by imposing a one-year term for the prison prior from the 2007 robbery conviction in addition to adding a five-year term based on the same offense under section 667, subdivision (a). He further contends the one-year term for the prison prior resulting from the 2005 conviction must be stricken because the court lacked the power to impose it. The Attorney General concedes that both prior prison terms must be stricken.

We accept the Attorney General's concessions. With respect to the 2007 robbery, a single prior conviction cannot be used as the basis for both a prior serious felony enhancement under section 667, subdivision (a), and a prior prison term enhancement under section 667.5, subdivision (b). (*People v. Jones* (1993) 5 Cal.4th 1142, 1150.) "[W]hen multiple statutory enhancement provisions are available for the same prior offense, one of which is a section 667 enhancement, the greatest enhancement, but only that one, will apply." (*Ibid.*) The court thereby erred by imposing the one-year term under section 667.5, subdivision (b), in addition to the five-year term for the 2007 robbery conviction. The one-year term based on the respective prison prior must be stricken. (*Id.* at p. 1153.)

With respect to the 2005 conviction, the trial court had the discretion to strike the term for the prison prior, but the court did not have authority to impose and then stay it. "Once the prior prison term is found true within the meaning of section 667.5(b), the trial court may not stay the one-year enhancement, which is mandatory unless stricken." (*People v. Langston* (2004) 33 Cal.4th 1237, 1241.)

Navarette requests that we strike both enhancements without remand. The Attorney General responds that we should remand for the court to correct the sentence. Because the record does not show how the trial court would have sentenced Navarette under the proper sentencing scheme, we will remand to give the trial court "an opportunity to restructure its sentencing choices." (*People v. Rodriguez* (2009) 47 Cal.4th 501, 509.)

D. *Correction of the Minutes of the Sentencing Hearing*

The minutes of the sentencing hearing state that the enhancements for the prior prison terms applied to each count consecutive to Count One. Navarette contends the minutes must be corrected because the trial court only imposed the enhancements once as part of the aggregate sentence, not as to each count consecutive to Count One. The Attorney General concedes that the minutes misstate the trial court's oral order. The Attorney General agrees that the court intended to impose the enhancements once as part of the aggregate sentence, not as to each count consecutive to Count One.

In imposing the prior prison term enhancements, the court stated the following: "As to the allegations within the meaning of 667.5(b)(2) as to both those allegations the Court imposes, but stays, one year as to each count. So that punishment is stayed."[3] By referring to "each count," it appears the court intended to refer to each of the enhancements, since each enhancement would result in a single one-year term under section 667.5, subdivision (b). But as the Attorney General points out, the issue is moot because we must order the enhancements stricken for the reasons forth in section II.C above.

III. DISPOSITION

The judgment is reversed. On remand, the trial court shall strike each one-year term imposed for Enhancement 3 and Enhancement 4 of the First Amended Information, and the court shall resentence defendant.

[3] The intended citation is to subdivision (b) of section 667.5, not subdivision (b)(2).

_____
RUSHING, P.J.

WE CONCUR:

_____
PREMO, J.

_____
GROVER, J.

People v. Navarette
H042842